

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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MICHAEL FOLEY,

Plaintiff,

Case No. 2:14-cv-00094-RFB-NJK

ORDER

Motions for Reconsideration

LOREA AROSTEGUI, *et al.*

Defendants.

I. INTRODUCTION

Before the Court is Defendants' Motion to Amend Judgment or in the Alternative Motion for Reconsideration (ECF No. 81) and Plaintiff's Motion for Reconsideration (ECF No. 82). For the reasons stated below, the Motions are denied.

II. BACKGROUND

Plaintiff filed a Complaint against Clark County and Clark County Family Services employees Lorea Arostegui, Georgina Stuart, Deborah Croshaw, Lisa Reese, and Lisa Ruiz-Lee on March 10, 2014. At a hearing on September 21, 2015, the Court dismissed all of Plaintiff's claims except for the due process and First Amendment retaliation claims, without prejudice. ECF

1 No. 42. Plaintiff filed his Second Amended Complaint on September 2, 2016. ECF No. 62.
2 Defendants filed a Motion for Summary Judgment on January 3, 2017. ECF No. 67. On February
3 1, 2018, the Court entered an Order granting in part and denying in part the Motion for Summary
4 Judgment. ECF No. 78. The Court granted summary judgment to the Defendants on all claims
5 except for Plaintiff's due process claim against Defendant Clark County and First Amendment
6 retaliation claim against Defendant Arostegui. *Id.* The Court allowed the due process claim to
7 proceed on the theory that Defendants did not provide Plaintiff with adequate due process
8 protections before they added him to the statewide child abuse registry. The Court allowed the
9 First Amendment retaliation claim to proceed based on the timing of Plaintiff filing a civil rights
10 lawsuit and Defendants opening their investigation into his alleged child abuse. At a status
11 conference on February 12, 2018, the Court gave the parties until February 26, 2018 to file
12 simultaneous Motions for Reconsideration of the Summary Judgment Order. ECF No. 79. On
13 February 26, 2018, the parties filed their Motions for Reconsideration. ECF Nos. 81 and 82.
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18 **III. LEGAL STANDARD**

19 **A. Motion for Reconsideration**

20 “As long as a district court has jurisdiction over the case, then it possesses the inherent
21 procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to
22 be sufficient.” *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885
23 (9th Cir. 2001) (internal quotation and citation omitted). However, “a motion for reconsideration
24 should not be granted, absent highly unusual circumstances, unless the district court is presented
25 with newly discovered evidence, committed clear error, or if there is an intervening change in the
26 controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880
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1 (9th Cir. 2009) (internal quotation and citation omitted). A motion for reconsideration “may not
2 be used to raise arguments or present evidence for the first time when they could reasonably have
3 been raised earlier in the litigation.” Id.
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6 IV. DISCUSSION

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8 A. Defendants’ Motion for Reconsideration (ECF No. 81)

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10 1. *Due Process Claim*

11 Defendants did not address the question of predeprivation due process in their summary
12 judgment briefing. They claim that the evidence they now submit in relation to predeprivation
13 process was not available previously because “[d]etails of the investigation surrounding Plaintiff’s
14 Complaint prior to Plaintiff’s name being entered into the Registry were not provided as Plaintiff’s
15 Amended Complaint appeared to primarily focus on the post deprivation process.” ECF No. 81 at
16 4. Even if this qualified the newly provided evidence as previously unavailable, the Court does not
17 find that Defendants have proven beyond dispute that Plaintiff was provided with adequate due
process protections in this case.

18 Defendants first argue that the due process claim was wrongfully decided because (1)
19 Plaintiff was given an adequate opportunity to be heard before he was deprived of his liberty
20 interest and (2) it would have been impractical for Defendant Clark County to provide any
21 additional protections before adding Plaintiff to the statewide child abuse registry. Defendants
22 contend that Plaintiff was given an adequate opportunity to be heard because the investigator called
23 Plaintiff twice during the course of the investigation and asked to speak with him about the
24 allegations against him, but he refused to cooperate. These steps alone are insufficient to satisfy
25 the requirements of due process. The evidence that Defendants cite to, case notes prepared by the
26 investigator, does not indicate that the investigator ever actually informed Plaintiff of the
27 possibility that he could be added to the statewide child abuse registry. The investigator merely
28 stated in her reports that “this worker explained that I work with CPS and would like to discuss a

1 report that we received about him and his children.” ECF No. 81, Ex. 1-B and 1-C. When Plaintiff
2 was informed that CPS would not be providing him with an attorney, he refused to cooperate and
3 stated that he would have his attorney contact the investigator, which evidently never happened.
4 *Id.* Based on this evidence, the Court does not find it undisputed that the Plaintiff was informed of
5 the potential deprivation of his liberty interest, the evidence against him, and the available
6 procedures to object to the deprivation, as required by due process. “Due process requires notice
7 ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
8 of the action and afford them an opportunity to present their objections.’” *United Student Aid*
9 *Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (quoting *Mullane v. Central Hanover Bank &*
10 *Trust Co.*, 339 U.S. 306, 314 (1950)). Defendants also argue that “Plaintiff hasn’t provided any
11 documentation let alone any relevant argument that the alleged abuse did not occur.” ECF No. 81
12 at 7. This is not a requirement for a due process claim and is irrelevant to the analysis here.
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14 Defendants also have not proved beyond dispute that it would have been impractical or
15 unduly burdensome for Defendant Clark County to provide additional procedural protections
16 before adding Plaintiff to the statewide child abuse registry. They argue generally that offering a
17 predeprivation process would have been impractical “[d]ue to the urgency of removing a child
18 from harm and preventing future abuse.” ECF No. 81 at 7. They allege that under the Nevada
19 statute, “[o]nce an investigator substantiated an investigation, that substantiation would
20 automatically enter the individual who was alleged to have caused the abuse into the Registry” and
21 therefore “Defendants would have no means of preventing the Registry submission unless the
22 investigation is delayed, postponed or inappropriately deemed unsubstantiated.” *Id.* at 9. Although
23 the safety of the minors being investigated by the Defendants is certainly of upmost importance,
24 Defendants do not provide any specific information regarding why that safety could not be
25 preserved while also offering adequate procedural protections to those under investigation. The
26 Defendants offer no reason why the process of safeguarding a minor by removing the minor from
27 a home must operate in parallel to the process for placing an individual into the registry. Indeed,
28 it would be reasonable to allow for an individual’s subsequent appeal or review of the abuse
determination to occur in conjunction with the process of placement in the registry.

1 Moreover, general references to “the urgency of removing a child from harm” are not
2 enough to prove impracticality without specific facts regarding the timeline of the investigation
3 and how disruptive it would have been to offer Plaintiff more comprehensive notice and an
4 opportunity to be heard before substantiating the abuse. In this case, the first report of abuse was
5 made on January 23, 2012 and the abuse was not substantiated until March 20, 2012. Defendants
6 had two months in which to properly apprise Plaintiff of the potential consequences of the
7 investigation and offer him an opportunity to tell his side of the story. Based on this timeline,
8 Defendants cannot simply claim that further protections were impractical without additional
9 evidence.

10 Finally, Defendants argue that Defendant Clark County cannot be held liable under a
11 Monell theory because it was not the final decision maker that created the policy at issue here.
12 Defendants fail to address the fact, which the Court explained in its Summary Judgment Order,
13 that the Ninth Circuit held in Humphries that a county could potentially be liable under Monell for
14 implementing a state statute, if it could have provided additional safeguards to implement the
15 statute constitutionally, but failed to do so. Humphries v. Cnty. of Los Angeles, 554 F.3d 1170,
16 1202 (9th Cir. 2009), as amended (Jan. 30, 2009), rev’d on other grounds, Los Angeles Cnty., Cal.
17 v. Humphries, 562 U.S. 29 (2010). For the same reasons the Court cannot find as a matter of law
18 that it was impractical for Defendant Clark County to provide Plaintiff with a predeprivation
19 process, the question of whether Clark County could have implemented the Nevada statute
20 constitutionally but failed to do so is yet to be resolved.

22 **2. First Amendment Retaliation Claim**

23 Defendants incorrectly assert that the timing of Plaintiff filing his civil rights lawsuit and
24 Defendant Arostegui opening the investigation into his alleged abuse does not raise a question of
25 fact regarding whether the investigation had a retaliatory motive. They state, “a quick glance at the
26 docket indicates that Plaintiff’s Amended Complaint was not even filed until April 10, 2014
27 (though not served) and was not even served to Defendants until December 10, 2014.” ECF No.
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1 81 at 10. However, the Court's Summary Judgment Order makes it clear that the alleged retaliation
2 was not in response to Plaintiff filing the current lawsuit, but for Plaintiff filing the civil action
3 Michael Foley v. Michelle Pont et al, Case No. 2:11-cv-01769-JCM-VCF. A quick glance at the
4 docket in that case shows that Defendant Stuart was served on January 31, 2012, around the same
5 time Defendant Arostegui opened the investigation into Plaintiff's alleged abuse. The Court will
6 not reconsider its decision on this claim.

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9 **B. Plaintiff's Motion for Reconsideration (ECF No. 82)**

10 The Court does not find that the Plaintiff has provided any facts in his Motion for
11 Reconsideration that he would have personal knowledge of, such that the Court could consider it
12 as evidence at the summary judgment stage. Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004).
13 The Court will not reconsider its decision as to any of the claims that it previously granted
14 summary judgment on.

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17 **V. CONCLUSION**

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19 Accordingly,

20 **IT IS HEREBY ORDERED** that Defendants' Motion to Amend Judgment or in the
21 Alternative Motion for Reconsideration (ECF No. 81) is DENIED.

22 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Reconsideration (ECF No. 82)
23 is DENIED.

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25 DATED: September 10, 2018.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE